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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE RALPH MARQUEZ,

Defendant and Appellant.

G040742

(Super. Ct. No. FSB048725)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Jon F. Ferguson, Judge. Affirmed as modified.

Doris M. Frizzell, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck,
David Delgado Rucci, and Christopher P. Beesley, Deputy Attorneys General, for
Plaintiff and Respondent.

Jose Marquez appeals from a judgment after the jury convicted him of mayhem and assault with a firearm and found true street terrorism, firearm, and great bodily injury enhancements. He argues insufficient evidence supports the street terrorism enhancements, the presentation of an exhibit was prejudicial, and because great bodily injury is an element of mayhem, the great bodily injury enhancement must be stricken. We agree the great bodily injury enhancement must be vacated, but conclude his other contentions have no merit. We affirm the judgment as modified.

FACTS

Jennifer Herrera lived with her father, William Graffius, her daughter, V.D., Graffius's daughter, C.G., and Herrera's boyfriend, Nathan Brown. One day, V.D. and C.G., were outside playing while Graffius stood on the front porch and watched over them. When 13-year-old R.J. threatened to hit C.G., Graffius "told him that guys that hit girls are punks." R.J. told Graffius he was going to tell someone what he said. Later, Graffius spoke to R.J.'s father, Ronald Jaramillo ("Looney") and clarified what he said to R.J. "out of respect[.]"

The next day, Herrera arrived home, and Marquez, Looney's brother, asked to use her cellular telephone to make an emergency call. Herrera complied, and when Marquez requested privacy, Herrera stepped away. Marquez handed the telephone to a friend and said, "'Fuck that bitch. I'm not giving back her phone.'" Herrera went to Looney's to ask for help in getting her telephone back, and Looney said he would either get it back or replace it. Herrera left to pickup her daughter. When she returned, Marquez was gone, and she asked Looney if he had retrieved her telephone. He said he had not and suggested she deactivate the telephone, which she did.

A little later, Marquez returned with two friends, one of whom stayed in the car. Marquez went inside Looney's house, and when they came outside, Looney told V.D., who was playing outside, to get her mother. When Herrera came outside, Looney went inside, and Marquez asked Herrera why she had turned her telephone off. Marquez

told Herrera she had disrespected him by turning the telephone off and told her to turn it back on. Herrera refused. Marquez repeatedly said Herrera and her family disrespected him and stated he was “Jinxy” from “Verdugo[.]” Brown arrived home and Marquez asked who he was. When Brown responded he was Herrera’s boyfriend, Marquez asked if he was “willing to get popped for her.” Herrera forced Brown inside the house. Marquez pulled a gun from his pocket and shot Herrera in the left leg. Marquez and his friends fled. Doctors did not remove the bullet from Herrera’s leg.

A second amended information charged Marquez with mayhem (Pen. Code, § 203)¹ (count 1), and assault with a firearm (§ 245, subd. (a)(2)) (count 2). The information alleged Marquez personally used a firearm, personally and intentionally discharged a firearm, personally and intentionally discharged a firearm and proximately caused great bodily injury as to count 1. (§ 12022.53, subds. (b), (c), (d).) The information also alleged he personally used a firearm as to count 2. (§ 12022.5, subd. (a).) As to both counts, the information alleged Marquez committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(c)), and he personally inflicted great bodily injury (§ 12022.7, subd. (a)). The information also alleged he suffered two prior convictions (§ 667.5, subd. (b)).

At trial, the prosecutor offered Herrera’s testimony. She explained the doctors could not remove the bullet from her leg, and that after the shooting, she could not walk for two months. Herrera added she still had problems with her leg, which was nearly two years after the shooting.

At trial, the prosecutor offered the testimony of Officer Jon Verbanic, a gang expert. After detailing his background, training, and experience, Verbanic testified concerning the culture and habits of criminal street gangs, including West Side Verdugo’s composition, territory, and symbols. Verbanic provided the legal definition of

¹ All further statutory references are to the Penal Code.

a criminal street gang and opined West Side Verdugo, which was comprised of four cliques of Hispanic street gangs, including “7th Street,” was a criminal street gang. Verbanic opined Marquez was a member of West Side Verdugo 7th Street criminal street gang. While showing Verbanic exhibit No. 12,² entitled “West Side Verdugo,” the prosecutor inquired about prior criminal cases involving West Side Verdugo gang members. First, Verbanic explained that in case No. FSB041376, Jose Navarro, a West Side Verdugo gang member, was convicted of murdering a young man who asked for a cigarette in October 2003. Second, he stated that in case No. FSB036169, Johnny Chagolla, a West Side Verdugo associate, was convicted of murder in September 2002. The prosecutor asked Verbanic whether he was familiar with the other four men pictured on exhibit No. 12, and he identified two of the men. Verbanic agreed West Side Verdugo “has had numerous members convicted in the recent past[.]” Based on a hypothetical mirroring the facts of this case, Verbanic testified the shooting was a gang-related crime because the person who deactivated the telephone disrespected the gang member, and the gang member retaliated by permanently maiming the victim thereby increasing his and the gang’s status.

On cross-examination, Verbanic admitted a gang member could commit a crime that did not benefit the gang, including one that was for disrespecting a family member. When defense counsel asked Verbanic whether he was familiar with the Jose Noya case, Verbanic responded, “The member of West Side Verdugo [who] committed a murder.” Verbanic conceded he was not familiar with the facts of that case, but only with the information that was on exhibit No. 12. Defense counsel then stated, “And, in fact, there’s a lot of murder up there [on exhibit No. 12], isn’t there?” After

² As we explain below, exhibit No. 12 was displayed to the jury during Verbanic’s testimony, but it was not admitted into evidence. In fact, the prosecutor did not move exhibit No. 12 into evidence after the trial court indicated the prosecutor did not lay the proper foundation for four of the six convictions.

Verbanic agreed there was, Verbanic said, “Robbed and murdered for small amounts of drugs. That would go to the top three; is that correct?” When Verbanic again agreed, defense counsel stated, “[a]nd then we have other murders. . . . [¶] . . . [¶] Murder is fairly common; is that correct?” Verbanic said it was. When defense counsel asked why the most recent predicate offense was committed in 2003, Verbanic responded, “No, there are more current ones.” Defense counsel inquired, “there is a lot of crimes committed by all the members of -- well, not all but members of. Members on an ongoing basis?” Verbanic responded, “Yes.” Defense counsel stated that according to exhibit No. 12, a gang member has to commit murder to earn respect within the gang, and it “[s]eems to be a pretty common pattern[.]” When Verbanic responded gang members did not always commit murder, defense counsel said, “Not always but more times than not[.]”

The trial court read the following stipulation to the jury: “Members of the West Side Verdugo, a criminal street gang, were convicted as follows[:] [¶] One, . . . Navarro was convicted of murder, . . . [s]ection 187, on April 13, 2004. [¶] And, two, . . . Chagolla was convicted of murder, . . . [s]ection 187, on February 17, 2005.”

Marquez waived his right to a trial on the truth of his prior convictions and admitted they were true. The jury convicted Marquez of both counts and found true all the enhancements. The trial court sentenced Marquez to a total term of 45 years to life in prison.

DISCUSSION

I. Sufficiency of Evidence-Criminal Street Gang’s Primary Activities

Marquez argues insufficient evidence supports the jury’s finding he committed counts 1 and 2 for the benefit of a criminal street gang because there was insufficient evidence West Side Verdugo’s primary activity was murder. As we explain below, we conclude the parties’ stipulation provided sufficient evidence West Side Verdugo was a criminal street gang.

“““To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.”” [Citations.] “““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.] The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

Section 186.22, subdivision (b)(1), increases the punishment for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” Section 186.22, subdivision (f), defines a “criminal street gang” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its *primary activities* the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (Italics added.)

Here, the parties’ written stipulation stated: “The Parties hereby stipulate that the following members of the *West Side Verdugo Criminal Street Gang* were convicted as follows: [¶] 1. . . . Navarro was convicted of [m]urder (. . . [s]ection 187) on April 13, 2004; AND [¶] 2. . . . Chagolla was convicted of [m]urder (. . .

[s]ection 187) on February 17, 2005.”³ (Italics added.) This stipulation was accepted by the trial court and admitted into evidence.

The trial court instructed the jury with Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 222, “Evidence,” which stated in relevant part: “During the trial, you were told that the People and the defense agreed, or stipulated, to certain facts. This means that they both accept those facts. Because there is no dispute about those facts you must accept them as true.”

We conclude the above stipulation provides sufficient evidence West Side Verdugo was a criminal street gang. The prosecutor was required to prove West Side Verdugo’s primary activity was murder to prove it was a criminal street gang. The parties stipulated West Side Verdugo was a criminal street gang, and therefore, Marquez’s contention there was insufficient evidence its primary activity was murder is meritless. Marquez’s stipulation West Side Verdugo was a criminal street gang made a finding its primary activity was murder unnecessary. Therefore, there was sufficient evidence for the jury to conclude Marquez committed counts 1 and 2 for the benefit of West Side Verdugo.

³ Additionally, before trial, the parties filed the following “Stipulation and Instruction,” which provided: “Both the prosecution and the defense stipulate to the following facts: [¶] 1. “West Side Verdugo[] (also known as ‘Calle Siete Locos’ or ‘CSL’ or ‘7th Street’)[,] is a criminal street gang within the meaning of . . . section 186.22. [¶] 2. Members of the West Side Verdugo[] (also known as ‘Calle Siete Locos’ or ‘CSL’ or ‘7th Street’)[,] criminal street gang engage in, or have engaged in, a pattern of criminal gang activity. [¶] You must regard these facts as proven beyond a reasonable doubt.”

Based on our review of the record, it does not appear this stipulation was provided to the jury. Defense counsel who stipulated to these facts was relieved. Although the minute order from August 15, 2005, indicates the parties stipulated to the predicate acts of the gang issue, the trial court did not swear in the jury until December 2006, and it does not appear defense counsel who tried the case stipulated to these facts.

II. Exhibit No. 12

Marquez claims he was prejudiced by the display of exhibit No. 12, a foam board that included photographs of 12 alleged West Side Verdugo gang members and corresponding information concerning six criminal case numbers. We disagree.

Before Verbanic testified, defense counsel objected to the admission of exhibit No. 12 on the grounds it was cumulative to Verbanic's testimony and it was unduly prejudicial. After hearing argument from both counsel, the trial court overruled the objection and stated the exhibit would be admitted if the prosecutor laid the proper foundation. Defense counsel responded, "So the court is indicating that prior to it being received into evidence, the foundation as to each case stated on --" When the court answered "correct[,]," defense counsel replied, "That's fine."

Defense counsel did not object to the display of exhibit No. 12 during Verbanic's testimony, and therefore, Marquez has forfeited appellate review of this claim. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 818-819 [failure to object on grounds asserted in appeal forfeits claim].) Further, when the prosecutor withdrew his motion to admit exhibit No. 12 into evidence, defense counsel did not request the trial court admonish the jury not to consider the information concerning the other four criminal cases displayed on the exhibit, and, thus, he cannot complain now on appeal there was prejudicial error. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590 [failure to make timely assertion of right forfeits claim].)

Finally, the trial court instructed the jury on the proper use of gang evidence as follows: "You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] [Marquez] acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes and enhancements; [¶] [or] [¶] [Marquez] had a motive to commit the crimes charged. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or

her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.” And, the trial court instructed the jury with CALCRIM No. 222, “Evidence,” which stated in relevant part: “You must use only the evidence that was presented in this courtroom. ‘Evidence’ is the sworn testimony of witnesses, *the exhibits admitted into evidence*, and anything else I told you to consider as evidence.” (Italics added.) “‘We presume that jurors understand and follow the court’s instructions’ [citations]. . . .” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

In any event, we conclude it was not reasonably probable Marquez would have received a more favorable verdict had exhibit No. 12 not been displayed. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 668-669.) Herrera’s testimony provided overwhelming evidence Marquez assaulted her with a firearm and unlawfully and maliciously deprived Herrera of the use of her leg, or disabled, disfigured, or rendered useless her left leg. Additionally, based on Verbanic’s testimony and the stipulation, there was sufficient evidence Marquez committed those crimes for the benefit of West Side Verdugo.

III. Section 12022.7, subdivision (a), enhancement

Marquez contends section 12022.7, subdivision (a)’s great bodily injury enhancement cannot attach to his mayhem conviction because great bodily injury is an element of that offense. The Attorney General concedes the error. In *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1559-1560, the court held that because infliction of great bodily injury is an element of the mayhem offense, a trial court may not rely on a great bodily injury enhancement to enhance a mayhem conviction. Here, the trial court stayed sentencing on the great bodily injury enhancement as to count 1 when it should have vacated this enhancement.

DISPOSITION

We remand the matter to the trial court to vacate the finding on the great bodily injury enhancement as to count 1. The clerk of the superior court is ordered to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations. We affirm the judgment as modified.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.